No. 02-0670

Supreme Court, U.S.
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In The

# Supreme Court of the United States

RALSTON HAUGHTON and
MARGARET HAUGHTON,

*Petitioners,*

v.

WAL-MART STORES, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit properly affirmed the district court's judgment in favor of the respondent because the respondent's conduct did not involve the requisite "state action" necessary to maintain an action pursuant to 42 U.S.C. Section 1983.

## INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

**Parties to Lawsuit**

Margaret Haughton

Ralston Haughton

Wal-Mart Stores, Inc.

**Other Interested Persons and Corporate Disclosure Statement**

Hon. L. Lanier Anderson, Judge, U.S. Court of Appeals, Eleventh Circuit

Hon. Rosemary Barkett, Judge, U.S. Court of Appeals, Eleventh Circuit

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John R. Hamilton, Esq.

Hon. Thomas B. McCoun III, U.S. Magistrate Judge, Middle District of Florida

Hon. Steven D. Merryday, U.S. District Judge, Middle District of Florida

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Wal-Mart de Mexico, S.A. de C.V.

Erin A. Webb, Atty. at Law

Hon. Charles R. Wilson, Judge, U.S. Court of Appeals, Eleventh Circuit

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## STATEMENT OF BASIS FOR JURISDICTION

The Haughtons' lawsuit was originally filed on May 18, 2001, in the Circuit Court of the Twelfth Judicial Circuit, in and for Sarasota County, Florida. They asserted, among other things, a claim under 42 U.S.C. Section 1983. Record 1:98. On June 13, 2001, Wal-Mart properly removed the action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. Section 1446(b). Record 1:1.

The district court entered a final judgment in Wal-Mart's favor on December 31, 2001. Record 1:100. The Haughtons filed a motion for reconsideration on January 3, 2002, and a motion for rehearing on January 8, 2002. Record 1:103; 1:104. The district court entered an order denying those motions on January 9, 2002. Record 1:106. On January 16, 2002, the Haughtons filed a notice of appeal, seeking appellate review by the United States Court of Appeals for the Eleventh Circuit. The Haughtons invoked the jurisdiction of the court of appeals under 28 U.S.C. Section 1291, and their notice of appeal was timely under rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

The court of appeals affirmed the judgment in Wal-Mart's favor through an unpublished decision rendered on July 19, 2002. Petition for Writ of Certiorari at 26-30. The Haughtons timely filed a petition for rehearing on August 6, 2002, which the court of appeals denied by an order entered on September 24, 2002. On October 29, 2002, the Haughtons filed with this Court a petition for a writ of certiorari, invoking this Court's jurisdiction under 28

U.S.C. Section 1254(1). The petition was timely under rule 13.1 of the Supreme Court Rules.

## STATEMENT OF THE CASE

On February 15, 2001, Ralston and Margaret Haughton, husband and wife, purchased merchandise from a Wal-Mart store in Sarasota, Florida. Record 1:98, ¶¶ 7-8. Ms. Haughton presented a personal check as payment for the merchandise. Record 1:98, ¶¶ 7-8. Wal-Mart accepted the check without hesitation,[1] but an employee wrote "B/F" on the check, signifying that Ms. Haughton is a black female. Record 1:98, ¶¶ 9-11. The employee also wrote Ms. Haughton's drivers license number and date of birth on the check. Record 1:98, Exh. A.

The notation on the check resulted from a store policy to record the race, sex, and other identifying information of those who presented checks for payment. Record 1:64:18. The policy was implemented as a consequence of contact that store representatives had initiated with the Florida State Attorney's Office, in which store representatives had sought advice regarding the information that the state attorney's office would need to prosecute those who presented worthless checks. Record 1:64:46-51.

Based upon guidelines suggested by the State Attorney's Office, the Wal-Mart store unilaterally implemented

[1] The Haughtons do not claim that Wal-Mart refused either to accept their check or to otherwise do business with them because of their race. They also claim no economic injury.

a policy mandating that all checks presented by customers be marked with certain information identifying the presenter, including the presenter's race. Record 1:63:62-63; 1:64:47. Contrary to what the Haughtons imply, the policy applies to every check, regardless of the race of the person presenting it. Record 1:63:50-51, 54; 1:65:34. The purpose of the policy's adoption was to help alleviate the store's problem with returned checks. Record 1:63:62-63; 1:64:47.

The Haughtons filed suit, alleging that the Wal-Mart employee's act of writing "B/F" on Ms. Haughton's check constituted a violation of 42 U.S.C. Section 1983 ("Section 1983"). Record 1:98, ¶¶ 14, 19, 27. The Haughtons also brought state-law claims for emotional distress and loss of consortium. Record 1:98, ¶¶ 22-31. The parties agree that the state-law claims are derivative of the Section 1983 claim. See Petition for Writ of Certiorari at 2.

The United States District Court for the Middle District of Florida entered a summary judgment in Wal-Mart's favor, concluding: (1) that the Haughtons were not subjected to unlawful discriminatory treatment; and (2) that the Haughtons had failed to show the requisite state action necessary to maintain a claim under Section 1983. Record 1:99. In an unpublished opinion, the United States Court of Appeals for the Eleventh Circuit affirmed solely on the latter ground, concluding that Wal-Mart did not act under color of state law. Petition for Writ of Certiorari at 26-30.

## ARGUMENTS FOR DENYING THE PETITION

### A. WELL-SETTLED PRINCIPLES OF LAW AND THE EVIDENCE IN THE RECORD ESTABLISH THAT WAL-MART WAS NOT A STATE ACTOR

To prevail on their claim under Section 1983, the Haughtons were required to establish at least two separate elements: (1) that that they were deprived of a right secured by the Constitution and the laws of the United States; and (2) that Wal-Mart deprived them of that right while acting under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S. Ct. 1729, 1733, 56 L. Ed. 2d 185, 193 (1978). To prove the second element, it was necessary for the Haughtons to show that Wal-Mart was a state actor or that its actions were properly attributable to the state itself. *Id.*, 436 U.S. at 156, 98 S. Ct. at 1733, 56 L. Ed. 2d at 193; *see also American Mfg'rs Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130, 143-44 (1999). They wholly failed to make such a showing. Based on well-established principles of law, no state action was presented in this case as a matter of law, and no grounds exist for granting the Haughtons' petition.

The Haughtons' argument to the contrary is predicated upon their naked assertion that "[t]he record evidence established that Respondent's policy of writing the race of the Petitioner on the Petitioners' check was a result of compulsion by the state or a symbiotic relationship under the nexus test." Petition for Writ of Certiorari at 7. In truth, however, the record shows unequivocally that Wal-Mart was not rendered a state actor under either rationale: it was not compelled by the state to adopt its check-acceptance policy, and it has no "relationship" with the state attorney's office, symbiotic or otherwise.

The record unambiguously shows that the Sarasota Wal-Mart store's motivation for identifying a customer's race on his or her check was to aid the store in alleviating its problems with returned checks. The only involvement of the state in that process was that the store solicited the state attorney's advice as to the information to include on checks presented for payment. In that regard, the assistant store manager, Michael Murphy, testified: "I am merely trying to protect my company, my store, and myself from a thief or people that don't want to be honest and write bad checks. It goes no further than the store." Record 1:71:40.

Similarly, the store manager, David Dickerson, testified: "We put the race and gender of everyone on the back of the check for the purposes of assisting us in identification in the event that we have to pursue collection on a fraudulent check or returned check." Record 1:63:6. The head of the store's accounting department, Carolyn Shelton, testified: "I did it because that's what we needed in order to prosecute checks." Record 1:65:50.

The record is replete with evidence refuting the Haughtons' allegation that the Sarasota Wal-Mart store is somehow in collusion with the state attorney. On the contrary, there is absolutely no evidence to support such an allegation. Indeed, there is no evidence that would even permit a reasonable inference that the Sarasota Wal-Mart store would suffer any adverse consequences from the Sarasota state attorney if it did not identify its customers' names on their checks. Likewise, there is no evidence that the state attorney *directed* the store to write the race of its customers on their checks. It merely recommended that the store do so to aid the state attorney in identifying and prosecuting customers who write worthless checks.

Thus, absolutely no evidence of state "compulsion" exists here. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S. Ct. 2764, 2771, 73 L. Ed. 2d 418, 428 (1982). Moreover, a state's mere authorization of, acquiescence in, encouragement of, or approval of a private action does not "convert that action into that of the State." *Flagg Bros.*, 436 U.S. at 164, 98 S. Ct. at 1737, 56 L. Ed. 2d at 198; *see Sullivan*, 526 U.S. at 52, 119 S. Ct. at 986, 143 L. Ed. 2d at 145; *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 2786, 73 L. Ed. 2d 534, 547 (1982).

Nor does such state authorization, acquiescence, or encouragement create a symbiotic relationship or close nexus between the state and the private actor. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173-75, 92 S. Ct. 1965, 1971-72, 32 L. Ed. 2d 627, 638 (1972); *see also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58, 85 S. Ct. 449, 457, 42 L. Ed. 2d 477, 488 (1974). Such a relationship exists only when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Sullivan*, 526 U.S. at 52, 119 S. Ct. at 986, 143 L. Ed. 2d at 145 (quoting *Blum*, 457 U.S. at 1004, 102 S. Ct. at 2786, 73 L. Ed. 2d at 546). Nothing of that nature exists here. Without question, state action is completely lacking.

## B. THE CASES CITED IN THE HAUGHTONS' PETITION DO NOT SUPPORT THEIR ARGUMENT THAT WAL-MART WAS ACTING UNDER COLOR OF STATE LAW

The cases cited in the Haughtons' petition are not to the contrary. All are easily distinguishable from the facts presented here, and each one in fact illustrates the fatal

deficiencies in the Haughtons' position. A review of those cases merely serves to emphasize the vast differences between this case and the cases in which this Court has held that state action existed.

For example, in *Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963), the petitioners were convicted of violating the Louisiana criminal mischief statute because they refused to leave a store when requested to do so by the store manager. This Court held that state action was present because it appeared from public statements of city officials that they directed continuance of segregated service in restaurants and prohibited any conduct directed towards its discontinuance. The evidence thus tended to indicate that the store official's actions were coerced by the city. 373 U.S. at 273, 83 S. Ct. at 1125, 10 L. Ed. 2d at 342. In the Haughtons' case, in contrast, no such coercion is presented.

Likewise inapposite is *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). In that case the defendant, a private corporation, operated a restaurant in a space that it leased in an automobile parking building owned and operated by an agency created by the State of Delaware to provide parking facilities. The restaurant constituted an integral part of the state's plan to operate the building as a self-sustaining unit. 365 U.S. at 718-20, 81 S. Ct. at 858-59, 6 L. Ed. 2d at 48-49. The lessee refused to serve the plaintiff solely on the ground that he was black. 365 U.S. at 720, 81 S. Ct. at 859, 6 L. Ed. 2d at 49.

This Court found that the Equal Protection Clause of the Fourteenth Amendment was violated by the refusal of the lessee of a state agency to serve a person because of

his race. In view of all the circumstances of the case – including the fact that the restaurant was physically and financially an integral part of a public building, it was built and maintained with public funds, it was devoted to a public parking service, and it was owned and operated by an agency of the state for public purposes – the state was a joint participant in the operation of the restaurant. 365 U.S. at 723-25, 81 S. Ct. at 860-63, 6 L. Ed. 2d at 51-52.

Similar "joint participant" considerations came into play in *Edmondson v. Leesville Concrete Company*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), and *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). In each case, this Court held that state action could occur when private actors make use of state procedures with overt, significant assistance and involvement of state officials. *Edmondson*, 500 U.S. 621-22, 111 S. Ct. at 2083-84, 114 L. Ed. 2d at 674 (peremptory challenges in civil action); *Pope*, 485 U.S. at 486, 108 S. Ct. at 1345, 99 L. Ed. 2d at 576 (nonclaim statute in probate proceedings); *Lugar*, 457 U.S. at 942, 102 S. Ct. at 2756, 73 L. Ed. 2d at 498 (attachment proceedings).

Such "joint participant" facts, however, are obviously not presented with respect to the so-called "relationship" between Wal-Mart and the state attorney's office in Sarasota. The two are not "joint participants" in anything remotely resembling the restaurant at issue in *Burton*. They are also not acting jointly in pursuance of a state procedure such as those at issue in *Edmondson*, *Pope*, and *Lugar*.

In the final analysis, the cases the Haughtons cite in their petition have virtually no relevance to the facts presented here.[2] They have cited no authority that would support a conclusion that Wal-Mart was engaging in state action when its employee wrote Ms. Haughton's race on her check. In fact, a conclusion to the contrary is mandated by the existing case law.

The treatment of this issue by the court of appeals was therefore correct. It shows neither a misapplication of the law nor the application of a rationale that is in conflict with either decisions of this Court or decisions of other courts of appeals:

> In order to prevail in an action brought under 42 U.S.C. § 1983, the plaintiffs must show that Wal-Mart acted under color of state law, and that it acted with discriminatory intent. The appellants argue that state action is present because Wal-Mart instituted its policy at the direction of the state attorney's office. Whether an entity is a state actor for the purposes of § 1983 is a mixed question of law and fact that we review de novo. *Duke v. Smith*, 13 F.3d 383, 392 (11th Cir. 1994).
>
> There are three primary tests for state action: the public function test, the state compulsion

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[2] The Haughtons misuse the term "conflict" in their argument. Petition for Writ of Certiorari at 7-15. The decision of the court of appeals is not in conflict with that of any other court. The Haughtons' actual argument is that the court of appeals did not agree that the cases they cited were applicable to the facts of this case. Certiorari is generally inappropriate in such instances. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

> test, and the nexus/joint action test. *NBC v. Communications Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988). The public function test would be met if Wal-Mart performed actions that were "traditionally the exclusive prerogative of the state." *Id.* The joint action or nexus test would be met if Wal-Mart and the state were so involved that they could be said to have a symbiotic relationship. *See, e.g., Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989) (finding police practice of detaining shoplifters without independent investigation to constitute "joint action"). And lastly, the state compulsion test would be met if the attorney general compelled, coerced, or significantly encouraged the action which was alleged to violate the Constitution. *Id.*
>
> After reviewing the record on appeal, it is clear that none of the three state action tests is met. Wal-Mart did not perform the state attorney's job in prosecuting check fraud, and the two entities were not "intertwined" in a symbiotic relationship. Finally, although the state attorney's office advised Wal-Mart of the information that it would like to have to prosecute check fraud, it did not compel or provide encouragement significant enough for Wal-Mart to have become a state actor under the state compulsion test.
>
> Because summary judgment was properly granted on this issue alone, we need not reach the question of discriminatory intent.

Petition for Writ of Certiorari at 27-28.

The reasoning of the court of appeals is unassailable, and it presents no basis for further review by this Court. The record established the absence of any disputed issue

of material fact on the question of whether Wal-Mart was acting under color of state law. Once it was established that the action of Wal-Mart was not state action, "the inquiry ends." *Rendell-Baker*, 457 U.S. at 838, 102 S. Ct. at 2770, 73 L. Ed. 2d at 426. The district court accordingly properly granted summary judgment in Wal-Mart's favor, and the court of appeals correctly affirmed that conclusion. Both courts applied well-settled principles of law to clearly-established facts. No further appellate review is warranted, and this Court should therefore deny the Haughtons' petition.

## CONCLUSION

For the foregoing reasons, Wal-Mart respectfully requests that the Court deny the Haughtons' petition for a writ of certiorari.

Respectfully submitted,

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